

Decision **PROPOSED DECISION OF ALJ LONG** (Mailed 3/6/2015)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Petition of Friends of the Earth to Adopt, Amend,
or Repeal a Regulation Pursuant to Pub. Util.
Code Section 1708.5 Regarding the Economics of,
and Appropriate Method of Compensation for,
the Diablo Canyon Nuclear Power Plant.

Petition 14-10-007
(Filed October 9, 2014)

**DECISION DENYING A PETITION TO OPEN A RULEMAKING TO EXAMINE
THE RATE REGULATION OF DIABLO CANYON A NUCLEAR-POWERED
GENERATION STATION****Summary**

This decision denies the Petition for a Rulemaking to adopt, amend, or repeal a regulation Petition (P.) 14-10-007 (Petition) to examine the regulatory treatment of Diablo Canyon Nuclear Power Station (Diablo Canyon), owned and operated by Pacific Gas & Electric Company (PG&E). The Petition fails for both procedural as well as substantive issues. The Commission already has existing tools and recurring proceedings where PG&E's operations of Diablo Canyon, as well as its costs imposed on ratepayers, are routinely examined or subject to examination. Further, the Commission can and will, as necessary, open specific proceedings to globally address the various changes in the electric generation market, the regulatory conditions applicable to Diablo Canyon, as well as relevant environmental issues, affecting Diablo Canyon and PG&E's ratepayers. Friends' Petition raises no facts and presents no analysis to conclude that a Rulemaking or Investigation is needed now.

Because this proceeding denies the Petition there are no changes to operations of Diablo Canyon which would affect the safety of PG&E's operations. Nor are there any changes to the costs imposed on ratepayers at this time.

This Petition is closed.

Background

On October 9, 2014, the Friends of the Earth (Friends) filed a Petition for a rulemaking pursuant to Pub. Util. Code § 1708.5¹ to adopt, amend, or repeal a regulation (Petition) alleging that the Diablo Canyon Nuclear Power Station

¹ § 1708.5.

(a) The commission shall permit interested persons to petition the commission to adopt, amend, or repeal a regulation.

(b) (1) The commission shall consider a petition and, within six months from the date of receipt of the petition, either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation.

(2) The commission may extend the six month period for consideration of a petition pursuant to paragraph (1) to allow public review and comment pursuant to subdivision (g) of Section 311.

(c) If the commission denies a petition, the order or resolution of the commission shall include a statement of the reasons of the commission for that denial.

(d) If the commission finds that it is precluded by law from granting a petition, the statement of reasons for denial pursuant to subdivision (c) shall identify the relevant provisions of law.

(e) The commission shall implement this section under the Rules of Practice and Procedure in effect on January 1, 2000. On or before July 1, 2001, the commission shall amend the Rules of Practice and Procedure to provide more specific procedures for handling a petition pursuant to this section.

(f) Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708.

(Added by Stats. 1999, Ch. 568, Sec. 2. Effective January 1, 2000.)

(Diablo Canyon), which is owned and operated by Pacific Gas and Electric Company (PG&E) under a valid license issued by the U.S. Nuclear Regulatory Commission, is uneconomic and that the compensation received by PG&E for the power produced by Diablo Canyon and the recovery of its capital costs is unreasonable.

A large portion of the Petition was a narrative from the perspective of Friends outlining its version of the licensing and regulatory history of Diablo Canyon. Much of that narrative is unsupported by a persuasive declaration or affidavit, and is therefore irrelevant to the current ratemaking and economics underlying the operations of Diablo Canyon at this time and it is disregarded. Friends' Petition completely fails to reach its goal of demonstrating that the Commission should open a Rulemaking now, as discussed below.

The relevant portion of the Petition, addressed in this decision, responds to the allegation by Friends that Diablo Canyon is uneconomic and/or that the compensation received by PG&E is unreasonable.

The Record

The record in this proceeding consists of all filed documents.

Standard of Review

The Petitioner, Friends, bears the burdens of proof and persuasion to show that its ratemaking and regulatory requests are just and reasonable.

Procedural History

On October 27, 2014, PG&E filed a Motion for a preemptory challenge of the assigned Administrative Law Judge (Judge.) On October 30, 2014 that motion was denied by the Commission's Chief Judge, ruling that a Petition was not yet a proceeding and therefore the rules for a preemptory challenge did not

yet apply; only if the Commission opened a proceeding would those rules be applicable (in this case a Rulemaking).

A status conference was tentatively scheduled for November 20, 2014 in anticipation that the assigned Commissioner and Judge might have follow-up questions or require further explanations of parties' statements in the petition or any responses to it. That hearing was subsequently cancelled by the Judge on November 17, 2014 when it was determined no questions or explanations were required.

On October 17, 2014, by ruling, the Judge imposed an ex parte ban on the proceeding. By a further ruling on November 19, 2014 the Judge lifted the ban but required the parties to comply with the ex parte rules as if the Petition was a ratesetting proceeding as defined in the ex parte rules.

Two parties were granted late status in the proceeding: The Coalition of California Utility Employees (CCUE) and The World Business Academy (Academy). This necessitated a delay in the schedule for Replies.

Four Responses were filed on November 10, 2014, by: The Utility Reform Network (TURN); CCUE; PG&E; and Academy. Replies were filed on November 26, 2014, by: Friends; TURN; CCUE; and PG&E. There were no evidentiary or other hearings. Because a Petition is not a proceeding, but merely a request to open a proceeding, there is no formal requirement for submission. As noted below, this decision was mailed for public review and comment pursuant to Pub. Util. Code § 311(g).

Discussion

We find Friends' Petition is defective and therefore fails for both procedural as well as substantive issues. (Pub. Util. Code Section 1708.5.) However, as also discussed, we believe that the existing regulatory proceeding

has been successful to date and we are likely to develop a more comprehensive Investigation, if needed in the future, to globally to address the various changes in the electric generation market, the regulatory conditions applicable to Diablo Canyon, as well as relevant environmental issues, affecting Diablo Canyon and PG&E's ratepayers. For example, there are seismic studies pursuant to Assembly Bill 1632, the important greenhouse gas emission avoidance benefits provided by Diablo Canyon, concern about possible periods of over-generation, and the remaining economic viability of Diablo Canyon, which may warrant a thoughtful investigation at the right time. This Petition suffers from its unsubstantiated and narrow perspective: shut down Diablo Canyon.

The Commission is able to timely open an Investigation on its own motion when the need arises. As discussed below, that time may be sooner, rather than later, but it is not now.

Whether the Petition Addresses a Proper Issue: Diablo Canyon

PG&E argues in its Response that Diablo Canyon is a single facility and that the Petition should procedurally fail because it does not address the Commission's rate regulation, for example, of all generation, but targets a single facility, and thus does not properly seek to have the Commission adopt, amend, or repeal a regulation as required by Section 1708.5(a).

We think this is too broad an interpretation: after all, Diablo Canyon is the only operational nuclear generating facility in California. Therefore, if and when the Commission decides to look at "nuclear" power, there is only one extant operating nuclear-powered facility. If we were to look exclusively at "solar" or "hydroelectric" the number of facilities would be much larger, and if Friends' Petition had targeted only one unit of many like-kind, it would clearly fail the

test. We do not want to narrowly interpret the code so that all sources of generation would of necessity have to be included in an Investigation or Rulemaking, when only one total population – all nuclear, all solar, and all hydroelectric – is relevant. We reject the argument that if there is only one nuclear, or one solar, or one hydroelectric facility, Section 1708.5 cannot be applied.

We also note that Section 1708.5 could apply to any total aspect of “a regulation,” for example, the regulation of residential rates, or load management programs, etc. This aspect of the section’s scope is relevant in that it applies to complete or identifiably unique aspect of rate regulation.

The Commission Already Considers Diablo Canyon in Other Proceedings

As the responsible ratesetting regulatory agency (the Nuclear Regulatory Commission has preemptive safety and physical operations jurisdiction) we are always concerned about the long-term future of Diablo Canyon and all other utility owned generation. PG&E’s current operating licenses for Units 1 and 2 expire in 2024 and 2025, respectively. Therefore it is possible that the units may continue to operate for another 9-10 years absent any change in licensing status.

But we do consider Diablo Canyon’s operations and rates in various recurring proceedings. As we recognized in Decision (D.) 14-08-032, which authorized PG&E’s 2014 general rate case revenue requirement, there are a number of uncertainties surrounding the future of Diablo Canyon. In that decision, the Commission stated:

As a preliminary observation, in addressing PG&E’s nuclear operations costs, we take general note that various degrees of uncertainty exist concerning future measures that may be imposed by other regulatory agencies to address, in particular, DCCP [Diablo Canyon] seismic risk and once-through cooling (OTC) requirements that may ultimately impact

future operation of DCP. In particular, PG&E has an ongoing commitment in connection with the operating licenses for DCP issued by the Nuclear Regulatory Commission (NRC) to fund and implement a Long Term Seismic Program (LTSP) to continuously study and update the state of knowledge regarding seismic hazards affecting DCP. The LTSP ensures that seismic hazards are continuously assessed by PG&E and the NRC and ensures the safe operation of Diablo Canyon. PG&E was expected to submit a draft report containing the most recent results of its seismic surveys to the NRC by mid-summer 2014. Depending on the outcome of these seismic studies, there could be potential long-term seismic vulnerabilities for DCP that would need to be addressed.

We make no ratemaking adjustments to reflect these uncertainties regarding DCP seismic studies at this time. In general recognition of such uncertainties, however, we affirm that the Commission retains discretion to exercise its options as may be deemed necessary to protect ratepayers from unreasonable costs if the plant was to no longer be operational.

(D.14-08-032 at 381.)

PG&E submitted its Central Coast California Seismic Imaging Project (Seismic Imaging) to the Nuclear Regulatory Commission and this Commission in September 2014. The Independent Peer Review Panel, which was created to review PG&E's seismic studies, is expected to complete its review and comments on the Seismic Imaging by the end of 2015. We can only move forward responsibly when we have meaningful results. It would be premature now.

California Independent System Operator

The California Independent System Operator (ISO) is not a regulatory agency: it is regulated by the Federal Energy Regulatory Commission. It formulates policies and regulations governing nuclear reactor and materials safety, issues orders to licensees, and adjudicates legal matters.²

² <http://www.nrc.gov/about-nrc/organization.html>

The ISO recently stated in its introduction to the Flexible Capacity Procurement, Market and Infrastructure Policy Issue Paper, that it issued on January 27, 2012:

The ISO's renewable integration studies are providing growing evidence that reliably operating the grid with a 33 percent Renewable Portfolio Standard (RPS) requires California to maintain a fleet with flexible capacity resources both now and into the future. As the level of intermittent resources typically used to meet RPS requirements continue to increase, so does the need for flexible capacity resources.³

In prepared testimony⁴ before the Federal Energy Regulatory Commission, Mark Rothleder, the ISO's Vice President, Market Quality and Renewable Integration, explained the ISO's increasing concern with over-generation conditions. He stated:

As we integrate greater volumes of variable energy resources in the West, however, the [ISO] and other balancing authority areas will need to manage the potential for increasing over-generation conditions.

Thus we can see in the near future that we may need to address Diablo Canyon's operations as the grid evolves.

Green House Gas Implications

Large base load resources like Diablo Canyon may begin to pose a challenge to the California grid and the implementation of the state's policy goals

³ See: <http://www.caiso.com/Documents/IssuePaper-FlexibleCapacityProcurement.pdf>

⁴ (February 19, 2015 Prepared Testimony of Mark Rothleder on behalf of the ISO, Technical Conference on Environmental Regulations and Electric Reliability, wholesale Electricity Markets, and Energy Infrastructure, Docket No. AD 15-4-000, at 1.)

to move to 50% renewable. Governor Brown, in his January 2015 inaugural address stated⁵ that:

I propose three ambitious goals to be accomplished within the next 15 years: Increase from one-third to 50 percent our electricity derived from renewable sources; Reduce today's petroleum use in cars and trucks by up to 50 percent; Double the efficiency of existing buildings and make heating fuels cleaner.

Clearly there are implications for Diablo Canyon in the drive for far more renewable generation in the grid, yet it may also have a significant role to play in the move to electric vehicles and away from petroleum use for cars and trucks. We are not yet in position to address either of these issues. An increase in renewable resources may lead to an increase for the need of more flexibly dispatched resources and potentially suggest the early retirement of large less flexible resources, such as, Diablo Canyon. But Diablo Canyon is already an available and reliable greenhouse gas-free resource; we should therefore consider it carefully in our currently existing and recurring resource planning proceedings.

Economic Arguments

Friends argue that Diablo Canyon is uneconomic. But there is no economic analysis whatsoever, on even a preliminary level, included with the Petition that would pass the first hurdle of showing how any viable specific alternative energy source or package of energy sources would provide the replacement power (including all of the electric characteristics Diablo Canyon provides to the grid) at a breakeven or cheaper long-term cost.

⁵ (<http://touch.latimes.com/#section/-1/article/p2p-82458133/>).

The underlying theme in the Petition is that “nuclear is bad.” That is a belief, not an economic or operating fact, which would warrant an immediate Rulemaking with a pre-determined outcome: shut down Diablo Canyon. The current rate regime applicable to Diablo Canyon has been found to result in just and reasonable rates. The actual rate mechanisms have changed during Diablo Canyon’s operating life thus showing that the Commission can and will adjust ratesetting when it is appropriate to do so. Friends have failed to offer a persuasive argument that it is time to change ratesetting now and therefore the Petition fails procedurally. (Rule 6.3(b).)

Categorization and Need for Hearing

A Petition for a Rulemaking is not a formal proceeding but merely a request for a proceeding. Therefore it was not preliminarily categorized and there was no preliminary determination of the need for hearings.

Comments on Proposed Decision

The proposed decision of the Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Timely comments were filed by Friends followed by a timely reply from PG&E. We make no changes based on those comments. Friends asked for a date certain when the Commission would examine Diablo Canyon; in effect a “backdoor” success for the Petition. If there was a reason now to open an investigation or rulemaking we would do so here. There is not. If and when conditions warrant a proceeding the Commission can and will act.

Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Douglas Long is the assigned Judge in this proceeding.

Findings of Fact

1. There is a complete record composed of all filed documents.
2. PG&E owns and operates Diablo Canyon, a properly licensed nuclear power station.
3. Diablo Canyon is the only operational nuclear generating facility in California.
4. Diablo Canyon is a greenhouse gas-free facility.
5. Diablo Canyon is subject to regular and ongoing regulatory oversight by both this Commission and the Nuclear Regulatory Commission.

Conclusions of Law

1. All rulings by the Chief Judge and assigned Judge should be affirmed.
2. The Petitioner bears the burdens of proof and persuasion to show that the its ratemaking and regulatory requests are just and reasonable.
3. The petitioner, Friends, has not met its burdens of proof and persuasion.
4. The prior regulatory and ratesetting history for Diablo Canyon is not relevant to addressing its current or future regulatory and ratesetting regime.
5. Section 1708.5 is applicable to a total group of facilities, e.g., all nuclear, all solar, or all hydroelectric, regardless of the number of units in that like-kind group, but not to only one unit within a larger like-kind group.
6. Section 1708.5 does not apply solely to physical facilities.
7. It is too restrictive to limit Section 1708.5 to all generating sources, or all distribution facilities, etc. when there are reasonable groupings such as all solar generation or all transformers.
8. The Commission has properly exercised its ratesetting authority applicable to Diablo Canyon.

9. The Commission is able to timely issue a rulemaking or investigation, addressing Diablo Canyon, on its own motion whenever it becomes warranted to do so.

10. The Petition should be denied.

O R D E R

IT IS ORDERED that:

1. The Petition for a Rulemaking to adopt, amend, or repeal a regulation is denied.

2. All rulings by the Chief Administrative Law Judge and assigned Judge are affirmed.

3. Petition 14-10-007 is closed.

This order is effective today.

Dated _____, at San Francisco, California.